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Exhuming Measure 7

Yvonne Buchanan

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by Yvonne Buchanan

Portland area freelance writer

"...nor shall private property be taken for public use, without just compensation." With those twelve words, the framers of the Fifth Amendment to the U.S. Constitution ignited a charge that detonated 209 years later when Oregon, a recognized leader in land use planning, passed the most sweeping property rights measure ever seen in this country's history.

The stunned silence that followed the Nov. 7 passage of Measure 7 lasted about three seconds. Then the measure's opponents, whose members had coalesced too late to put up an effective fight before the election, rallied troops and won a preliminary injunction just one day before the measure was to take effect. While Marion County Circuit Judge Paul Lipscomb, who issued the injunction, deliberated on the measure's constitutionality, the state's Attorney General worked with a team of lawyers to produce an opinion defining the scope of the measure. The 110-page opinion, released on Feb. 13, showed Measure 7 to be more far reaching than the measure's opponents had feared, more so even than the measure's backer's claimed was their intent.

On Feb. 22, Lipscomb's ruling came: Measure 7 was found to be unconstitutional on two grounds: it failed to inform voters of all of the changes it would make to the state's Constitution, and it failed the "separate" test that requires Constitutional amendments that are not "closely related" to be voted on separately. The measure's opponents – diverse parties such as the land use watchdog group 1000 Friends of Oregon, the League of Oregon Cities, and Audrey McCall, widow of former governor Tom McCall, celebrated while Oregonians in Action (OIA), the property rights group that sponsored the measure, cried foul. OIA argued they were not given a fair hearing in the deliberation, were kept out of the process and further claimed that the state's attorneys did not fight vigorously for the measure.

The anticipated appeal of Lipcomb's ruling was filed by both the Attorney General's Office (to seek further court guidance on the initiative process) and the OIA. The Oregon Appeals court will most likely decide the issue no earlier than next year.

Oregon can't afford to wait. Several significant land use and urban planning projects have been put on hold pending the outcome of the Measure 7 court battle. Among them: Metro may suspend work on its proposed streamside buffers aimed at addressing threatened salmon and steelhead under the federal Endangered Species Act; the Land Conservation and Development Commission postponed action on new urban growth boundary expansion rules; Clackamas halted efforts to include Damascus within the urban growth boundary; Gresham postponed a public hearing on its 400-page effort to rewrite its development code; Eugene postponed implementing its first major rewrite of the city's land use regulations in more than 30 years; and Lake Oswego postponed its drive for annexation of nearby communities. Many of these projects have been in the works for years, but are now on hold pending the outcome of Measure 7 in the courts.

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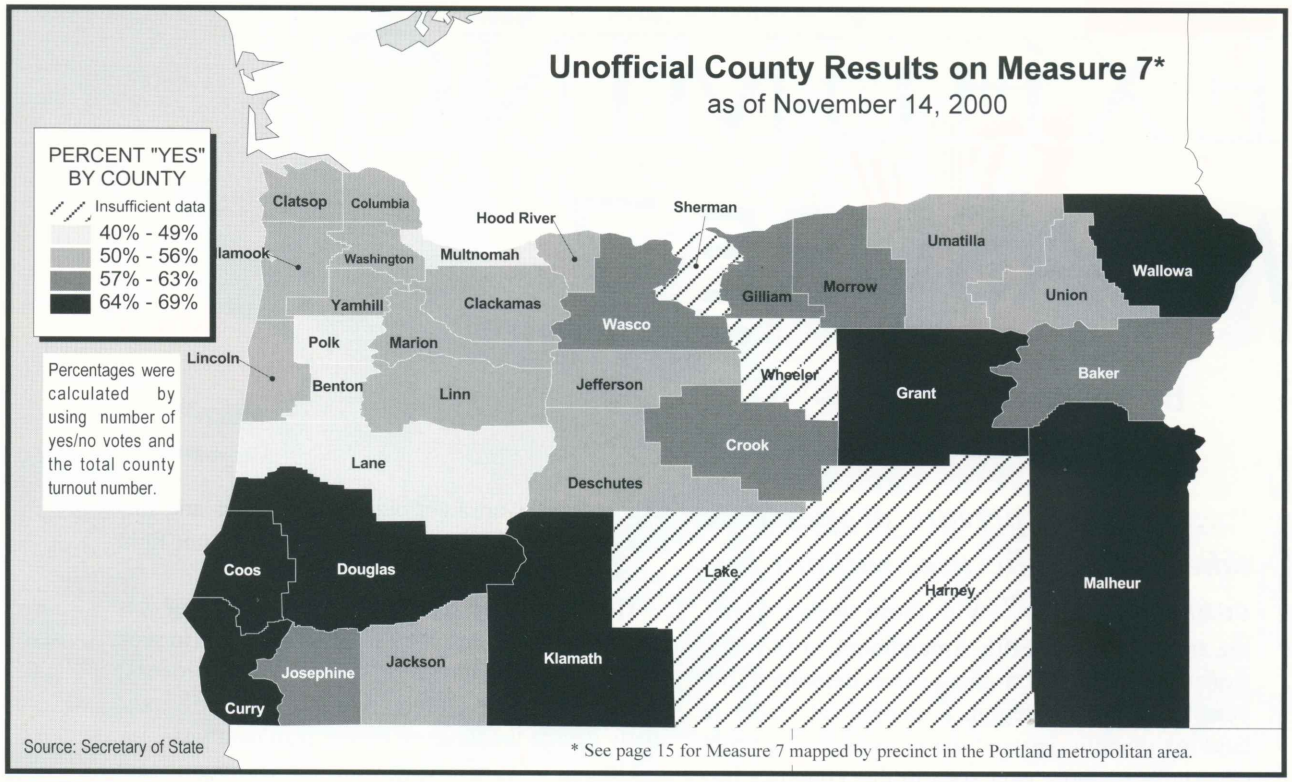
Enter a hardy team of legislators. Led by House Judiciary Committee Chairman Max Williams (R-Tigard), the Committee on Land Use and Regulatory Fairness formed in the wake of Measure 7's passage. Its mission: to repeal the

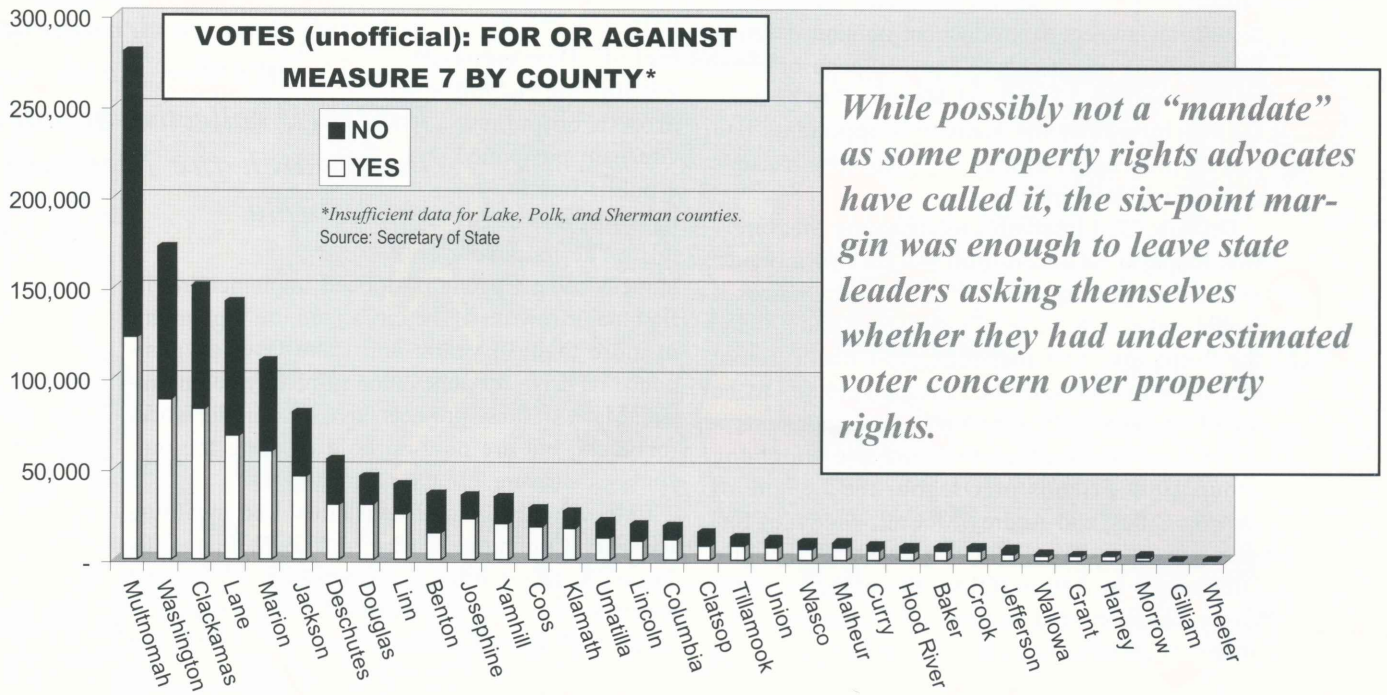


measure and create a new proposal both sides can agree on, then present this to the voters at the next election. Initial drafts of the proposal show that it will differ widely from Measure 7 in several key areas, and will both define and limit the measure's scope.

How We Got Here

Legislators, academicians, attorneys, property rights activists and environmental groups in other states now hold their collective breath as they watch the Measure 7 saga unfold. Oregon is widely recognized as a leader in smart growth and effective land use planning. "If [Measure 7] can pass in Oregon," said one property rights activist, "surely it can pass anywhere."

If Measure 7 "slipped under the radar," as Randy Tucker of 1000 Friends puts it, it may be because of the way it came across the transom. Generally



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property rights measures begin at the legislative level and travel to the voters as a bill. In contrast, Measure 7 came directly to the voters as an initiative, which gave its supporters the ability to shape its presentation, including the wording of its ballot title, which reads: "Amends Constitution: Requires Payment to Landowner if Government Regulation Reduces Property Value." Ballot Measure 7 was initially drafted by Oregon Taxpayers United, a libertarian group led by Bill Sizemore, and later turned over to Oregonians in Action. What became Measure 7 was submitted to the Secretary of State on March 10, 1999, and was available for comment on its title and summary until April 1, 1999. No one opposed either the title or its summary.

Measure 7 did not start getting real media coverage until early October when polls showed voters evenly divided over the issue. At that time, opposition kicked in with a media blitz, and was able to include in the voter's pamphlet an estimated annual cost ($5.4 billion). This estimate was derived from a similar but less sweeping takings measure that had failed in Washington. But the opposition's efforts were too late, and in a ballot loaded with 26 initiatives, the measure with the innocuous title not only passed, it won in all but three counties (Benton, Lane, and Multnomah). Statewide, Measure 7 got 53 percent of the vote. While possibly not a "mandate" as some property rights advocates have called it, the six-point margin was enough to leave state leaders asking themselves whether they had underestimated voter concern over property rights.

A report issued by economic consulting firm ECONorthwest found that while voters believed property owners should be compensated for reductions in property values caused by government action, they did not understand the details of Measure 7 or its intricacies. It is easy to see why voters were and still are confused. Before and after the election, parties on both sides of the issue trotted out worst-case scenarios in what one urban historian called "the battle of the anecdotes." Measure 7 supporters pointed to 80-year-old widows deprived of their nest eggs when zoning restrictions limited the use of their land. Opponents argued that the measure would devastate land use planning and the quality of life that Oregonians have come to enjoy.

A look at the drafts of city and county ordinances for takings claims, hastily prepared in the wake of Measure 7's passage, shows why the measure has struck such a dissonant chord with land use planners and environmental groups. Taking their cue from the "waiver" provision in Measure 7, many local ordinances included an escape hatch: the option to not enforce the zoning regulation that gave rise to the claim. 1000 Friends responded by suing 23 cities, citing concerns that the ordinances could be used "to authorize everything from cell towers in residential zones to development on coastal sand dunes." When the preliminary injunction temporarily halted Measure 7's implementation, local bureaucrats hastily tucked these draft ordinances away, and hoped they would never again see the light of day.

Measure 7 proponents didn't like the ordinances either, but for different reasons. Some ordinances included filing and appraisal fees of several thousand dollars. And some, such as Multnomah County's version, redefined key terms in the measure's text, significantly limiting its scope.

Initial indications are that the proposal will have something for everyone to loathe and love.

Takings laws are not new to Oregon, nor is the concept of compensating landowners for loss in property value caused by regulatory changes. When Oregon's current land use system was created under Senate Bill 100, SB849 was also introduced. It would have required compensation to landowners who were harmed by zoning changes. The bill was never signed. Instead, a committee was formed to recommend a compensation plan to the legislature, but the group never completed its mission. This left Oregon with the 1920s takings law as defined in Article 1, Section 18 of the state's Constitution: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation ..." But whereas "taking" had heretofore meant the full and complete taking of a property under the "eminent domain" principle, Measure 7 required compensation for even partial takings.

Where We Go From Here

What comes next is up to the people of Oregon. The Committee on Land Use and Regulatory Fairness plans to put a rewrite of Measure 7 before the voters in the November election. But first it has to get warring factions to agree on the wording, then, because it will be a revision to the Constitution and not an amendment, it will need to pass by two-thirds majority in both chambers of the legislature. Only after those two monumental goals are accomplished will it be presented to the voters. Initial indications are that the proposal will have something for everyone to loathe and love. Sticking points will most likely be percentage limits, retroactivity, and the absence or presence of a waiver provision.

OIA's vice president of government affairs Bill Moshofsky says, "We would be very strongly opposed to any regulation that did not compensate

from the first dollar [in lost value]." While adding that the group may need to weigh whether to fight that issue, he maintained that it saw a percentage limit as a "slippery slope" that they would prefer not to travel.

OIA would like to include some retroactivity relating to zoning changes that occurred before Measure 7 (or its rewrite) takes effect. "While we don't endorse windfalls," Moshofsky says, "we do feel that those who've lost value as a result of regulations should be compensated if the regulations were imposed after they purchased the property."

OIA would also like to include a waiver provision that allows the zoning authority the option of waiving a regulation rather than paying a claim. "We think in many cases [waiving the regulation] would be the best public policy. This will put government in a case-by-case basis. They'll have to ask, 'is it worth it?'"

On the other hand, Measure 7 opponents believe strongly in a percentage limit, would prefer to see any legislation be proactive rather than retroactive and opposes any waiver conditions because of the potential impact on environmental and urban planning policies.

It would be ideal if Oregon could look to the Supreme Court for guidance in the matter. But there is very little help to be found there. As Moshofsky notes, "The [takings clause of the] Fifth Amendment isn't even a complete sentence."

And while Supreme Court decisions since 1922 have moved the takings issue ever so gingerly to the right, offering some allowance for claims of partial takings, the Court has repeatedly concluded that it is unable to come up with a single litmus test for what constitutes a taking and that, because of this, each case must be examined on an "ad hoc, factual" basis. Justice Oliver Wendell Holmes, in an oft-quoted speech (Pennsylvania Coal v. Mahon, 1922), said, "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." But he did not argue for a general rule of compensation because, as he explained, the government "could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the law."

In its attempt to define what constituted a taking, the Supreme Court identified three factors to be analyzed: 1) the economic impact on a property owner; 2) the extent to which regulation interferes with investment-backed expectations; and 3) the character of the regulating government's actions. But not only are these terms open to broad interpretation, takings rulings based on them have generally been so narrowly construed and so seemingly contradictory with other High Court rulings as to be a source of more confusion than illumination. As the Supreme Court of Washington observed (Orion Corp. v. State, 1987), "Despite these attempts [SC rulings in First English, Nollan and Keystone], the definitive answers, so necessary for state courts to make reasoned determinations concerning [takings laws], remain unavailable. Our task is complicated further by the ambiguities contained in recent Supreme Court decisions and by the fact that despite a three-month separation, recent cases do not cite each other." As Washington State Justice

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Oregon's popular Bottle Bill would have been eliminated under Measure 7.

Oregon's state land use Goal 14 requires all cities to estimate future growth and needs for land and then plan and zone enough land to meet those needs. It calls for each city to establish an "urban growth boundary" (UGB) to identify and separate urbanizable land from rural land. Under Measure 7, it is likely that this goal would be unenforceable.

Stevens lamented, "even the wisest lawyers would have to acknowledge great uncertainty about the scope of takings jurisprudence."

If the Supreme Court doesn't offer sufficient guidance, our counterparts in other states haven't provided much either. While 26 states have enacted property rights laws, only a handful deal with the regulatory compensation issue. Among these: Florida, Louisiana, Mississippi, and Texas. These laws generally set a percentage by which property value must be diminished before a claim may be filed (between 10 and 50 percent), but beyond that they have little in common. A report published by the Lincoln Institute, a land use think tank at Harvard University, suggests that these laws have not been in place long enough for anyone to know what their impact will be. The report, "State Property Rights Laws: The Impacts of Those Laws on My Land," observes, "Opponents suggest, and proponents do not disagree, that the real purpose of these [compensation-based] laws is to bring the regulatory machinery of government to a halt."

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– State Property Rights Laws: The Impacts of Those Laws on My Land Report

Proponents of property rights laws suggest that the real "teeth" in such laws can be found only when claims are filed. Frank Vitello, of the conservative advocacy group Defenders of Property Rights, states, "Litigation defines legislation. Pieces of legislation are just that until they are defined by case law. To be truly accurate in saying property rights protections are in place, you have to take a look at how effective the law is and how it is being applied/defined."

In fact, very few takings claims have been filed since the implementation of these state laws, so there has been no real test of their impact. Therefore, it would be difficult, even unwise, for Oregon to base its property rights legislation on these laws. In addition, the landscape of these states differs vastly from that of Oregon.

"The strongest motivation for creating the Oregon land use planning system in the 1970s was to preserve agricultural land in the Willamette Valley," said Carl Abbott, Portland State University professor of urban planning and development. Speaking at a May 15 roundtable conducted by PSU's Institute of Portland Metropolitan Studies, he continued, "One reason this goal resonated with so many people is that the Valley is limited in size, and its limits are visible on any clear day. We stand in the middle of the Valley, look east and west and know that its farmland is finite. Contrast this with Kansas or Indianapolis, where corn fields seem to stretch outward forever, and it is harder to get excited about limiting sprawl."

At the same event, Jim Brown, executive director of the Lincoln Institute, and a leading authority on land use matters, suggested that the solution to the takings issue would be found only if the lines of communication between the two sides remained open. When asked whether there was some place where a fair process had been implemented that Oregon might use as a guidepost, he responded, "My sense is that you [Oregonians] have the best shot at it. If the answer isn't here, it isn't anywhere." M